LE COPY

Office-Supreme Court, U.S.
FILED
DEC 1 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 485

CROSLEY BROADCASTING CORPORATION, *Petitioner*

v.

WIBC, INC. and FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

BRIEF OF RESPONDENT, WIBC, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WIBC, INC.
THOMAS W. WILSON
THOMAS W. WALL
EARL R. STANLEY
HARRY T. ICE
ALAN T. NOLAN
Attorneys for the Respondent

Of Counsel:

DOW, LOHNES & ALBERTSON
600 Munsey Building
Washington, D. C.

ROSS MCCORD ICE & MILLER
9th Floor Consolidated Building
Indianapolis, Indiana

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Statutes Involved	1
Questions Presented	2
Statement of the Case	6
Argument	11
Conclusion	19
Appendix A	21

AUTHORITIES CITED

CASES:

American Locomotive Company v. Chemical Research Corporation, 171 F.2d 115 (6th Cir. 1948) .. 18
Helvering v. Ethel D. Co., 63 App. D.C. 157, 70 F.2d 761 (1934) 17
Securities and Exchange Commission v. Chenery Corp. et al., 317 U.S. 80, 63 Sup. Ct. 454, 87 L.Ed. 826 (1943) 14
Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 Sup. Ct. 456, 95 L.Ed. 456 (1951) 17
Yates v. American Republics Corporation, 163 F.2d 178 (10th Cir. 1947) 18
Zenith Radio Corp. v. Federal Communications Commission, 93 U.S. App. D.C. 284, 211 F.2d 629 (1954) 18

STATUTES:

Administrative Procedure Act of 1946, 60 Stat. 243, 5 U.S.C.
Sec. 10 (e), 5 U.S.C. Sec. 1009 (e) 17

Communications Act of 1934, as amended, 67 Stat. 718, 47 U.S.C.
Section 4 (a), 47 U.S.C. Sec. 154 (a) 15
Section 4 (h), 47 U.S.C. Sec. 154 (h) 15
Section 4 (i), 47 U.S.C. Sec. 154 (i) 15
Section 303 (1), 47 U.S.C. Sec. 303 (l) 15
Section 409 (b), 47 U.S.C. Sec. 409 (b) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 485

CROSLEY BROADCASTING CORPORATION, *Petitioner*

v.

WIBC, INC. and FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

BRIEF OF RESPONDENT, WIBC, INC.

IN OPPOSITION

TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATUTES INVOLVED

In addition to those statutory provisions identified in the petition, Section 4 (a) and (i) and Section 303 (1) of the Communications Act of 1934, as amended (47 U.S.C. Sections 154 (a) and (i) and Section 303 (1)) are involved. These provisions are set forth in Appendix A hereto.

QUESTIONS PRESENTED

Preliminary Statement

This case was originally decided before the Federal Communications Commission by its Order of March 6, 1957. That order was entered on a four-to-three vote.[1] Commissioner T. A. M. Craven cast the fourth and decisive vote. Commissioner Craven, who up to the time of oral argument had been an engineering

---

[1] "Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Applications of

INDIANAPOLIS BROADCASTING, INC. Indianapolis, Indiana	DOCKET NO. 8906 File No. BPCT-281
WIBC, INC. Indianapolis, Indiana	DOCKET NO. 8908 File No. BPCT-328
MID-WEST T. V. CORPORATION Indianapolis, Indiana	DOCKET NO. 10947 File No. BPCT-1599
CROSLEY BROADCASTING CORPORATION Indianapolis, Indiana	DOCKET NO. 10948 File No. BPCT-1837

For Construction Permits for New Television Stations (Channel 13)

DECISION

By the Commission: *Commissioners Hyde and Bartley dissenting* and issuing statements; *Commissioner Lee dissenting*; Commissioner Craven concurring and issuing a statement.

"IT IS, THEREFORE, ORDERED, This 6th day of March, 1957, that the application of Crosley Broadcasting Corporation for a new commercial television broadcast station to operate on Channel 13 in Indianapolis, Indiana IS HEREBY GRANTED, subject to the condition that its antenna structure shall be painted and lighted in accordance with Part 17 of the Commission's Rules; IT IS FURTHER ORDERED, That the applications of Indianapolis Broadcasting, Inc., WIBC, Inc., and Mid-West T.V. Corporation for the same facilities ARE HEREBY DENIED . . ." (J.A. 9, 163). (Emphasis Supplied)

representative of one of the parties to the case, was not a member of the Commission at the time of oral argument.[2] He did not hear oral argument as required by statute.[3]

Petitioner's first attempt to avoid the fact that Commissioner Craven voted without having heard oral argument is on a plurality-majority theory. In order to present the plurality-majority question, Petitioner must show that the decision of the Commission was not by a four-to-three vote. Petitioner cannot, however, avoid the fact that the decision was the result of a four-to-three vote. In an effort to avoid this fact, Petitioner has not referred to the four-to-three Order of the Commission of March 6, 1957, but resorts instead to minutes of certain *internal dis-*

---

[2] According to minutes of the Commission for February 27, 1957, Craven said:

> "I was not a member of the Commission when the Oral Argument was held . . ." (J.A. 193)

He also said:

> "My reason for abstaining from voting is because the engineering firm with which I was formerly associated prepared the engineering phases of the application, participated in pretrial conferences and attended the hearings in behalf of one of the applicants in this proceeding." (J.A. 191)

[3] The Communications Act provides for reference to examiners and an initial decision by an examiner. The statute then provides:

> "In all such cases the Commission shall permit the filing of exceptions to such initial decision . . . and shall, upon request, *hear oral argument* on such exceptions before the entry of any final decision, order, or requirement." (48 Stat. 1096 (1934), as amended, 47 U.S.C. sec. 409 (b) (1957)). (Emphasis Supplied)

In this case, such exceptions were taken and a request for oral argument was filed.

cussions and preliminary voting of the Commission leading up to the entry of the Order of March 6, 1957. This technique results in the following erroneous statements appearing on pages 2 and 3 of Petitioner's "Questions Presented":—

1. Two separate votes were not taken on the final day on the choice of the best applicant and petitioner's reference to a "first vote" and "second vote" are misleading and inaccurate.[4]
2. It is not a fact that "ultimately four commissioners voted for petitioner, one voted for a second applicant, one voted for a third applicant, and one voted to reopen the record."
3. The Court of Appeals did not *hold* "that a majority—as opposed to a plurality—vote of participating Commissioners was necessary for a legally valid decision."

All of the Petitioner's characterizations of "two decisions" are misleading because the only vote on the order of the Commission which decided the case was the final four-to-three vote.

Petitioner's second attempt to avoid the fact of Craven's voting without having heard oral argument is on the ground of waiver. Petitioner uses the argumentative term "substitute its judgment" in reference to the Court of Appeals' decision that Re-

[4] Respondent frankly is not certain of petitioner's meaning when petitioner refers to "two separate votes" and to a "first vote" and a "second vote," which terminology has never before been used at any stage of this proceeding. Although the petition does not identify or define these terms, it seems likely that the term "first vote" is intended to apply to the vote reflected in the Commission's minutes of March 6, 1957. (J.A. 194-202) The term "second vote" presumably refers to the published Order of March 6, 1957, which decided the case.

spondent had not waived oral argument before Commissioner Craven. The legal issue of waiver arose out of the following question asked at the oral argument, at which time Commissioner Craven was not a member of the Commission:

> "Gentlemen, do you have any objection to any Commissioner who is not present participating in this proceeding?" (J.A. 8)

To this question there was no response.

Analysis of Petitioner's Questions

Since the Order of the Commission was entered on the basis of four votes for an award to Petitioner and three votes against that award, the first question stated by Petitioner is a wholly hypothetical one. The question neither decided the case in the Court of Appeals nor would it decide the case now.

Since the Court of Appeals decided a question of law on the basis of undisputed facts when it ruled that respondent had not waived its right to oral argument before Commissioner Craven, Petitioner's second question is also a hypothetical one and tenders no issue which would be decisive of this case.

Although Petitioner may desire answers to its hypothetical and argumentative questions, it has stated no questions "expressed in the terms and circumstances of the case," as required by this Court's Rule 23 (c).

STATEMENT OF THE CASE

The Order of the Commission

The Order of the Federal Communications Commission awarding Channel 13 in Indianapolis to Petitioner was entered on March 6, 1957. It has never been contended by any party to the proceeding that this published document, certified by the Secretary of the Commission, inaccurately reflects either what the Commission decided or the votes of the commissioners.

As an examination of the Order shows, Commissioners McConnaughey, Mack, Doerfer and Craven voted therein for Petitioner; Commissioners Lee, Hyde, and Bartley dissented. Two of the dissenters wrote opinions stating various affirmative views and preferences, but all three of the dissenters expressly voted against an award to Petitioner: (J.A. 9, 164-68) Accordingly, the Order of March 6, 1957, was entered as a result of the vote of four commissioners for Petitioner, and three commissioners against Petitioner. The decisive fourth vote for the Order was cast by Commissioner Craven who up to the time of oral argument had been an engineering representative for one of the parties to the case, who was not on the Commission at the time of the oral argument, and who, therefore, did not hear oral argument.

The Preliminary Votes and Discussions

The Commission's internal discussion and preliminary voting *prior to* the entry of the Order of March 6, 1957, appear in the minutes of the Commission, which minutes are the acts of the Minute Clerk of the Commission, are only "as complete as possible," and are "not necessarily verbatim."

(J.A. 190) Although Respondent contends that these internal and preliminary considerations of the Commission are irrelevant, the minutes reflect only one vote on the merits of the case on March 6, 1957. Insofar as the merits were concerned, Commission Chairman McConnaughey presented the question of a decision for Petitioner to the other six commissioners. (J.A. 195) Then Commissioners McConnaughey, Mack and Doerfer voted to adopt said decision. Commissioners Hyde, Bartley and Lee, while stating various preferences and views including the propriety of reopening the record, voted against the adoption of said decision. Commissioner Craven did not vote. (J.A. 195) Chairman McConnaughey then stated the results of the vote as follows:

> ". . . three Commissioners had reached a decision to adopt the Decision and three to not adopt." (J.A. 196)

Following the three-to-three vote, and after a discussion of whether Commissioner Craven should vote at all in view of what the commissioners termed an "impasse" (J.A. 200), Commissioner Craven voted for the award to Petitioner. (J.A. 202) In his concurring statement, Commissioner Craven justified his voting on the ground that the other six commissioners were "hopelessly deadlocked and that no decision can be reached without my participation." (J.A. 168)

Craven's vote increased to four the number of commissioners voting for adoption of the decision to make the award to Petitioner and left at three the number of commissioners voting against that award. As reflected in the minutes themselves (J.A. 195-202) and in the Commission's decision and Order of

March 6, 1957, three Commissioner's expressly dissented from the award to Petitioner.

Facts Concerning the Oral Argument

Disregarding irrelevant and immaterial matter, the following are the undisputed facts concerning Commissioner Craven's voting without having heard oral argument:

1. At the time of the oral argument, there were seven members of the Commission. These men were Commissioners McConnaughey, Doerfer, Mack, Hyde, Bartley, Lee and Webster.
2. At the time of the oral argument, Craven, who up to that point had been engaged in the case as engineering counsel for one of the parties to the case, was not a member of the Commission. (J.A. 167, 191)
3. Of the seven Commissioners, six were present at the oral argument. Commissioner Webster was absent. (J.A. 6)
4. The question asked by the Chairman at the oral argument was whether there was any objection "to *any Commissioner who is not present* participating in this proceeding," to which there was no response. (J.A. 8) (Emphasis Supplied)
5. Approximately a month after the oral argument, Craven became a Commissioner.

The History of the Case

Administrative Review. Promptly following the Commission's Order of March 6, 1957, the issue of Craven's voting without having heard oral argument was raised. The review was confined to the Order of March 6, 1957. It did not extend to the internal and preliminary discussions of the commissioners. The

Commission at no time contended or ruled that the vote of Craven was unnecessary to its final order, nor that the case had been decided previously or without his vote. Nor did the Petitioner or any other party at any time during administrative review make either of those contentions.[5]

Contentions in the Court of Appeals. After the exhaustion of administrative review, WIBC, Inc., Respondent herein, appealed to the U. S. Court of Appeals for the District of Columbia Circuit. Other appellants thereafter dismissed their appeals. The Commission was the appellee before said Court of Appeals and Petitioner was an intervenor. Petitioner raised the asserted plurality-majority issue for the first time in the Court of Appeals and contended that Craven's vote was unnecessary. But the Commission relied in that Court on waiver and a contention of administrative necessity in defending Craven's voting. The Commission contended in its brief and argument that an "*unbreakable impasse*" existed and that Craven had to vote to break the "*deadlock.*" The Commission's brief also referred to the need for a "*tie-breaking measure.*" The principal argument of the Commission was that the vote of Craven was "*absolutely necessary*" in order for the Commission to decide the case.

---

[5] Although the motions and petitions and responses thereto filed during administrative review are printed at length in the Joint Appendix, the contentions of the parties and grounds for rulings may more conveniently be determined by examining the following rulings of the Commission: Order of June 21, 1957 (J.A. 175-81); Memorandum Opinion and Order of June 21, 1957 (J.A. 181-89); Memorandum Opinion and Order of October 25, 1957 (J.A. 243-62); Memorandum Opinion and Order of October 25, 1957 (J.A. 263-67); and Memorandum Opinion and Order of October 25, 1957 (J.A. 267-77).

The Action of the U. S. Court of Appeals for the District of Columbia Circuit: The Court of Appeals did not review the internal and preliminary discussion of the Commission reflected in the minutes. Instead, the Court of Appeals reviewed the Order of the Commission of March 6, 1957. The Court held that Craven was disqualified because he had not heard oral argument and that oral argument before Craven had not been waived. Contrary to Petitioner's contention at page 2 of its petition, the Court clearly did not *hold* "that a majority — as opposed to a plurality — vote of participating commissioners was necessary for a legally valid decision." The Court did *discuss* this point in denying a subsequently filed petition for rehearing *en banc*. It noted, among other things, the Commission's contention in the Court of Appeals that the vote of Craven "was necessary to avoid an impasse." The remaining language of the Court concerning the plurality-majority contention must be considered in the context of the facts of the case which the Court was then deciding. That case, as has been stated, involved an order issued upon a four-to-three vote. The plurality-majority discussion by the Court was unnecessary to its decision. It did not decide the case. Accordingly, applying ordinary legal principles, it cannot be stated that the Court of Appeals made any *holding* on the hypothetical plurality-majority question.

The Position of the Commission. Unlike petitioner, the Commission, appellee in the court below, did not petition that court for rehearing. Consistent therewith, the Commission does not appear as a Petitioner in this Court. Thus, the administrative body whose actions and procedures are involved expresses no

concern as a result of the effect of the rulings of the Court of Appeals.

ARGUMENT

I

THE PLURALITY-MAJORITY QUESTION

The Commission's Order Moots This Question

The only order of the Commission deciding this case is the published and certified Order of March 6, 1957. The Commission's consideration of this case prior to the entry of this order did not decide the case. And the discussion and voting prior to the entry of this order was merely preliminary discussion and was merged into the final order at the time it was entered.

The Order of March 6, 1957 was the only order which, throughout administrative review and in the Court of Appeals, was treated by the Commission as the official action of the Commission. The appeal to the Court of Appeals was from this order and not from any minutes or preliminary voting of the Commission. The appeal would not have been supportable on the basis of the minutes of the Commission. It was the Order of March 6, 1957, and not the prior minutes and voting of the Commission, which was reviewed by the Court of Appeals. It has never been, and is not now contended, that this order inaccurately reflects the views of the commissioners. No more warrant exists here for going behind the Order of March 6, 1957 than would exist for going behind the decision of a court in order to examine the judges' views as expressed in conference. Until preliminary tests of views in conference result in the entry of an order by any tribunal, in legal effect

no final and binding act by that tribunal has taken place. Accordingly, if the action of the Court of Appeals is to be reviewed, such action must be reviewed with reference to the Commission's Order of March 6, 1957.

The votes of the commissioners appear on the face of the decision preceding the Order of March 6, 1957. Four commissioners voted for an award to petitioner and three commissioners voted against such award. *Regardless of the reasons for these votes or views which the three dissenters may have had on other questions, each of the three dissenters expressly voted against the award which four commissioners voted for.* This means that in this case, where there were three votes against an award to petitioner, the requirement of either a plurality *or* a majority was four votes. Accordingly, the Court of Appeals rejected the contention that Craven's vote was unnecessary to the Order. What was true in the Court of Appeals is still true. In this case the plurality-majority issue is wholly a hypothetical one, which issue neither decided the case in the Court of Appeals nor would decide the case now. Regardless of the question of how many votes are or are not required for *a* decision, four votes were required here because there were three votes against *the* Order finally entered.

The Question Is Also Moot in the Preliminary Minutes

Even if this Court were to look behind the Order of March 6, 1957 and examine the test voting prior to that order on the basis of the Minute Clerk's entries, it would find that the petition errs in stating the character of this voting. A fair reading of these

entries discloses that the final preliminary votes were exactly those which appeared in the Order of March 6, 1957 on the basis of which the Order was entered.

The minutes for March 6, 1957 show that the commissioners voted "on the Decision as presented to the Commission" by its staff. This proposed decision was the award to Petitioner. (J.A. 195, 198) After Commissioners McConnaughey, Mack and Doerfer had voted for that decision, the other three, while expressing various preferences among the other applicants and on other questions, stated negative views about the decision for petitioner. That this was the substance of the statements of these latter three commissioners is apparent from the Chairman's statement that after the vote of the commissioners a decision had been reached by ". . . three to not adopt" the award to petitioner. (J.A. 196) Dissent of the three commissioners is also the only reasonable inference from the protracted discussion concerning deadlocks and impasses which, as Craven stated in his Concurring Statement, induced him to vote. The minutes then conclude with the following entry: "Commissioners Hyde and Bartley dissenting and issuing statements; Commissioner Lee dissenting . . ." (J.A. 202)

Since the commissioners were not voting abstractly, but were voting on the proposition of an award to Petitioner, it is apparent that in the final vote prior to the order itself, three commissioners voted *against* said order. Even if the Order of March 6, 1957 is disregarded, the petition does not candidly and fairly describe the "*ultimate*" vote. There the voting was

r in favor of an award for Petitioner and three inst such an award. The plurality-majority issue s is also moot on the basis of the Minute Clerk's es of the preliminary discussions and positions of commissioners.

Doctrine of the Chenery Case

n addition to its hypothetical character, there is ther defect to the assertion of the plurality-jority issue. As has been stated, the contentions the vote of Craven was unnecesary to the order, that the case was decided without his vote, have er at any time been made by the Commission itself. the contrary, the administrative necessity ground oted by the Commission during administrative ew and in the Court of Appeals to justify Craven's ticipation was the antithesis of such a contention. in the Court of Appeals, Petitioner is in the sition of saying that the Commission had really ided for Petitioner in certain preliminary checking positions when the Commission itself thought it s at an impasse. The Federal Communications mmission is a creature of Congress. The actions the Commission should not be justified upon ounds different than those upon which the Commis-on itself relied. *Securities and Exchange Commission* v. *Chenery Corp, et al.*, 317 U.S. 80, 87, 63 up. Ct. 454, 87 L. Ed. 626, 633 (1943).

he Merits of the Question

If petitioner could overcome the problems of moot-ss and the *Chenery* doctrine, the merits of its ntention could be examined. It is significant that titioner is unable to cite a single case which decides

that only a plurality vote is required in the Federal Communications Commission or any comparable Federal agency. This is not a mere coincidence. The Communications Act of 1934 provides a standard of "public convenience, interest, or necessity" and authorizes licensing in accordance with this standard.[6] Congress has constituted a commission of seven members authorized to make the decisions as to public convenience, interest or necessity.[7] If the plurality rule were in effect, as few as two commissioners could control the award in a case involving six applicants. As stated in the statistics appearing on page 14 of the petition, this number of applicants does not represent an exaggerated case.

Splinter and minority decisions generally are not in the public interest. And a statute fixing a public convenience, interest or necessity standard and establishing a commission of seven persons to apply that standard may not reasonably be interpreted as contemplating a decision by two of these persons. Without more in the statute, it is unreasonable to claim that Congress contemplated a determination of public convenience, interest or necessity by two of seven members. This is especially so in a statute which requires a quorum of four of the seven men to perform any official acts of any character.[8]

A consideration of the merits of the plurality-majority question has another aspect. Even if a majority vote were not *required* by the statute, such

---

[6] 48 Stat. 1082 (1934), as amended, 47 U.S.C. Sec. 303.

[7] 48 Stat. 1066 (1934), as amended, 47 U.S.C. Sec. 154 (a) and (i).

[8] 48 Stat. 1066 (1934), as amended, 47 U.S.C. Sec. 154 (h).

a requirement is *consistent* with the statute. As acknowledged by the Commission in the oral argument in the court below, *the Commission has always administratively required a majority vote of participating commissioners.* Even if the plurality-majority issue were properly present in this case, the Commission's administrative interpretation of its statutory mandate means that the petitioner is asking that the Commission's rule be changed in the middle of a case, without notice to the parties or even knowledge of the Commission that the rule changed. Certainly no one would be more surprised than the members of the Commission to learn that this case was actually decided before Craven voted! Actually, Petitioner is asking this Court to advise the Commission that it had decided a case without even knowing that it had done so. Since the Commission itself is not a petitioner here, this Court may disregard Petitioner's extravagant remarks about the effects of a change in the Commission's majority vote requirement which change has not in fact taken place.

II

THE ADMINISTRATIVE FINALITY QUESTION

The Question Is Moot

The facts on which the waiver question turned are plain. The question asked concerned participation by "*any commissioner who is not present.*" It did *not* relate to persons who were not commissioners, or who might later have become commissioners. Commissioner Webster was, at the time of the question, a "commissioner not puresent." T. A. M. Craven who, up to that point, had been acting in an advocate's role, was not a commissioner at all. These facts are undisputed.

In spite of the absence here of any fact question, in an effort to bring the petition within Rule 19, Petitioner relies on the doctrine of administrative finality as described in this Court's decision in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 71 Sup. Ct. 456, 95 L. Ed. 456 (1951). That case and the doctrine concern the scope of review of evidence supporting findings of fact. Neither the case nor the doctrine has any application to a question of law arising upon undisputed facts. On questions of law, the jurisdiction of the U. S. Court of Appeals for the District of Columbia Circuit to correct the Commission's legal errors is without limitation. Thus, there is no question here of the Court of Appeals' "substituting its judgment" or failing "to give proper and legal effect to the findings and determinations of the Commission." On the contrary, consistent with the jurisdiction of the Court of Appeals, as provided in Section 10 (e) of the Administrative Procedure Act, to set aside agency action "not in accordance with law,"[9] the Court of Appeals reversed the Commission on the legal question of waiver.

The Court Correctly Found an Absence of Waiver

The Court of Appeals did not err in its decision on the legal question of waiver. A "waiver is generally defined to be the surrender or relinquishment of an existing right." (Emphasis Supplied) *Helvering* v. *Ethel D. Co.*, 63 App. D.C. 157, 70 F.2d 761, 763 (1934). This principal is otherwise stated in terms of the requirement of *a right, knowledge of*

[9] 60 Stat. 243 (1946), 5 U.S.C. Sec. 1009 (e).

such right, and a clearly indicated intention to relinquish such right. *Zenith Radio Corp.* v. *Federal Communications Commission*, 93 U.S. App. D.C. 284, 288, 211 F.2d 629, 634 (1954); *Yates* v. *American Republics Corporation*, 163 F.2d 178, 179 (10th Cir. 1947); *American Locomotive Company* v. *Chemical Research Corporation*, 171 F.2d 115, 121 (6th Cir. 1948).

Here Respondent had no right at all to oral argument before Craven because he was not a commissioner at the time of oral argument. Respondent thus had no choice to insist upon or relinquish an argument before Craven. Insistence by respondent for oral argument before a man who was not then a commissioner would have been futile. There is simply no way to provide an oral argument before persons who are not members of the Commission. Thus, there was in truth and fact no *existing right* which Respondent could have relinquished, and there could, therefore, have been no *knowledge of such right* or *intention to relinquish it*.

Consistent with the above analysis, the Court may reexamine the words used. On their face the plain meaning of those words prevents any conclusion in favor of waiver. The words concerned *commissioners not present*. Nothing was said about non-commissioners or about appointees who might later, if they survived and the Senate approved, become commissioners. If one goes beyond the plain meaning and into the context of the words, the conclusion is the same. Not only was E. M. Webster then a commissioner, but he was also a commissioner "who is not present." Plainly the words applied to him. But T. A. M. Craven was not

then a commissioner at all. In context the words could have no reasonable application to T. A. M. Craven. Finally, it is simply unrealistic to contend that Respondent consented to let another party's advocate break an impasse and cast the deciding vote either with or without oral argument.

CONCLUSION

The plurality-majority issue is claimed by the Petitioner to involve, within Rule 19, the Court of Appeals' decision on an important question of federal law which has not been, but should be settled by this Court. The fact is that said question was moot before the Court of Appeals and is moot here. In addition, if the question were not moot, the rule of the *Chenery*, case *supra*, provides another obstacle to the consideration of the question. And had the Court of Appeals decided that a majority vote—and not a plurality—was required, that decision would have been correct and a decision contrary thereto would change the Commission's administrative rule in the middle of a case.

The Court of Appeals' decision on the waiver question is claimed by the petition to involve, within Rule 19, a decision on the federal question of administrative finality in conflict with the decisions of this Court. But, the Court of Appeals' decision on waiver decided a question of the law of waiver, with which the doctrine of administrative finality has nothing to do. Whether or not this is a federal question within the meaning of Rule 19, the Court of Appeals' decision was not in conflict with any decisions of this Court.

It is submitted that neither of the efforts to avoid the effect of Commissioner Craven's voting with-

out having heard oral argument has merit. The petition should be denied.

Respectfully submitted,

WIBC, INC.

THOMAS W. WILSON
THOMAS W. WALL
EARL R. STANLEY
HARRY T. ICE
ALAN T. NOLAN
Attorneys for the Respondent

Of Counsel:

DOW LOHNES & ALBERTSON
600 Munsey Building
Washington, D. C.

ROSS MCCORD ICE & MILLER
9th Floor Consolidated Building
Indianapolis, Indiana

APPENDIX A

Communications Act of 1934, as Amended

Section 4 (a)

"The Federal Communications Commission (in this chapter referred to as the "Commission") shall be composed of seven commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom the President shall designate as chairman." (48 Stat. 1066 (1934), as amended, 47 U.S.C. Sec. 154 (a)).

Section 4 (i)

"The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." (48 Stat. 1066 (1934), as amended, 47 U.S.C. Sec. 154 (i)).

Section 303

"Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

. . .

(l) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commission finds qualified. . . ." (48 Stat. 1082 (1934), as amended, 47 U.S.C. Sec. 303 (l)).